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JUL 1 2003

No. 02-1687

IN THE

Supreme Court of the United States

ROGER MILLER AND RUTH MILLER,
Petitioners,

v.

LAWRENCE SILVER AND SILVER & FIELD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondents Collaterally Attacked the Arbitration Award.

Respondents do not dispute that whether arbitration awards may be collaterally attacked is an important question on which the circuits are in conflict. Instead, respondents repeatedly deny having collaterally attacked the arbitration award in this case.[1] But their denials cannot change undisputed facts.

After the arbitration ordered by the California state court at respondents' request culminated in an award in petitioners' favor, respondents did not file a timely petition to vacate the award, under either the California arbitration statute or the Federal Arbitration Act. Rather than follow the established procedure for review, respondents urged the District Court in Maryland to enjoin enforcement of the award. And rather than advance a recognized ground for overturning an arbitration award, respondents attacked the award as "manifestly unjust." C.A. App. 968. Indeed, they invoked the narrowness of the established grounds for review as a reason for the District Court to intervene. *Id.* 961 ("The award may not be overturned by the [California] Superior Court except upon a showing that it was procured by means of fraud, corruption, or undue means . . . ."). It is difficult to conceive of a clearer example of a collateral attack on an arbitration award.

Respondents say they made no collateral attack because they "first invoked the District Court's jurisdiction in April 1999," before the arbitration was ordered, and their post-

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[1] *See* Br. Opp. 13 ("The Petition assumes a false premise: that Silver & Field collaterally attacked an arbitration award."), 18 ("Silver & Field Made No Collateral Attack. . . . Nor is there any meaningful sense in which Silver & Field engaged in a collateral attack."), 20 ("Silver & Field has not made any collateral attack").

arbitration motion in 2001 sought reconsideration of the April 1999 order declining to assume jurisdiction. Br. Opp. 18. Respondents' argument fails for two reasons.

First, in 1999 respondents requested only that the District Court adjudicate their entitlement to a lien, not that it adjudicate petitioners' malpractice claim.[2] The limited nature of respondents' request is reflected in the court's April 22, 1999 Memorandum, which identified the issues presented as "(1) whether this Court has jurisdiction to adjudicate the merits of the lien; and (2) whether the notice of the lien should be stricken." Appendix to Pet. Cert. ("A.") 66a-67a. Not until after the arbitration was conducted, and the arbitrator awarded damages to petitioners, did respondents urge the District Court to exercise jurisdiction over the malpractice claim.

Second, that respondents' post-arbitration motion purported to seek reconsideration of a pre-arbitration ruling does not change the substance of the motion. The motion sought to block enforcement of an award *in a completed arbitration*, and to do so by *bypassing the review procedures and standards established by federal and state arbitration statutes*. Respondents sought no relief from any court between the time petitioners' malpractice claim was sent to arbitration—on respondents' own motion—and the arbitrator's award. They did not ask any court to halt the arbitration or to limit the arguments petitioners were presenting. Only after the arbitrator's award did respondents argue to the District Court that petitioners' malpractice claim conflicted with the court's order approving the class action settlement. C.A App. 969. And respondents ignored the

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[2] *See* C.A. App. 635 (respondents contend, in opposition to petitioners' motion to strike respondents' notice of lien, that the work respondents did in state court "fully justifies the lien"), 865-66 (declaration of respondent Lawrence Silver attaching petitioners' complaint for malpractice but not requesting that the District Court exercise jurisdiction over it).

established procedures and grounds for reviewing arbitration awards. For example, they attacked the award as "manifestly unjust." *Id.* 968. Yet this Court, in summarily reversing a federal appellate decision that had departed from the established grounds for review, has specifically held that judicial "consider[ation] [of] whether there is equity in a particular claim . . . usurps a function which . . . is entrusted to the arbitration tribunal." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001) (per curiam) (quotations omitted) (second ellipsis in original). Similarly, respondents faulted the arbitrator for "not explain[ing] his decision," C.A. App. 968, in spite of the fact that "[a]n award in United States commercial arbitrations . . . usually does not . . . contain a statement of findings or reasons . . . ." NORMAN SOLOVAY *et al.*, ALTERNATIVE DISPUTE RESOLUTION § 11.01[2] (2000).[3]

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[3] Citing the District Court's statement in 2001 that petitioners in 1999 had "misrepresented that issues of state law would predominate in resolution of the dispute," A. 61a, respondents argue that petitioners "may not now attempt to benefit from those misrepresentations by denying the jurisdiction of the District Court to decide these issues." Br. Opp. 18. That argument is also unsound. First, as noted, the issues presented to the District Court in 1999 concerned the lien, not the malpractice claim. *See* p. 2, *supra*. What petitioners told the court in 1999 was that *"[t]he lien dispute* between the Millers and Silver involves only questions of California state law and arises from Silver's representation of the Millers before California state courts and regulatory bodies exclusively . . . ." C.A. App. 888 (emphasis added). That was absolutely true. Second, state-law issues also predominated in resolution of the malpractice claim. Third, because arbitration awards are not subject to collateral attack, the District Court had no business entertaining respondents' motion to enjoin enforcement of the arbitration award in the first place. The court could not confer on itself authority to hear a collateral attack merely by criticizing petitioners' arguments in 1999. The District Court itself primarily relied upon petitioners' "arguments before the arbitrator," rather than upon arguments made in court in 1999. A. 61a. Finally, the court could not properly have taken jurisdiction of the malpractice claim in 1999 even if it had been asked to do so and even if the parties could have predicted

Respondents attacked an arbitration award, and they did so through a procedure and on grounds at odds with the settled procedures and grounds for reviewing arbitration awards. By any standard, that is a collateral attack on an arbitration award.[4] This Court should decide whether such attacks are permissible.

2. The Mere Assertion That the Arbitrator Lacked Jurisdiction Does Not Justify Disregard of Traditional Principles of Equity.

The petition also asks this Court to clarify that a federal court's obligation to follow traditional principles of equity applies to injunctions under the All Writs Act, 28 U.S.C. § 1651(a), not just those under Fed. R. Civ. P. 65. *See* Pet. Cert. 19-26. Respondents again do not dispute the importance of the question. Nor do they dispute that the holding of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), applies to injunctions under the All Writs Act. Respondents' only argument is that whether a federal court is limited by traditional principles of equity "hardly arises" because the California arbitrator purportedly lacked jurisdiction to issue his decision. Br. Opp. 20. Respondents' argument not only depends upon a completely untenable view of the extent of the federal courts' exclusive jurisdiction, *see* Part 3, *infra*, but also confuses two

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the issues that would later arise when the claim was arbitrated. It is therefore illogical to use criticism of petitioners' arguments in 1999 as a basis for saying the arbitrator impinged on the District Court's jurisdiction.

[4] Despite their many denials, ultimately even respondents appear to acknowledge that they collaterally attacked the arbitration award. *See* Br. Opp. 20 (arguing that the arbitrator lacked subject matter jurisdiction, and that under California law decisions made without jurisdiction "are void, and *subject to collateral attack*" (emphasis added)); *id.* (arguing that under California law "any 'judgment' entered without subject matter jurisdiction, which the arbitrator attempted to do in this case, is void and *subject to collateral attack*" (emphasis added)).

fundamentally distinct questions: (1) whether the arbitrator exceeded his jurisdiction; and (2) whether the District Court was authorized to enjoin enforcement of the award without following traditional principles of equity, including the requirement that there be no adequate remedy at law. *See* Pet. Cert. 20.

Even if there was a basis (which there was not) to question the arbitrator's jurisdiction,[5] under *Grupo Mexicano* the District Court should not have disregarded the long-standing limitations on the grant of equitable relief. Among other things, the District Court should have considered whether respondents had an adequate remedy at law, as in fact they did because they could have presented their jurisdictional argument to a California court through a petition to vacate filed under the California arbitration statute. This Court should make clear that federal courts cannot avoid the duty to apply traditional equitable principles merely by invoking the All Writs Act.

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[5] In the arbitration itself, respondents raised no objection to the arbitrator's jurisdiction. Although respondents take issue with the statement in the petition that pointed out the absence of such an objection, Br. Opp. 11, the record citations they provide do not support their position that they contested the arbitrator's jurisdiction. One page cited by respondents merely contains the vague assertion of respondents to the District Court in 2001 that they had moved for summary judgment before the arbitrator "on, among other things, the subject of some of the matters that we have here." C.A. App. 1542. The other page cited merely contains respondents' assertion to the District Court in 2001 that they had argued to the arbitrator, in a motion for summary judgment, a motion in limine, and their concluding briefs, that the class action settlement agreement and the order approving it vested exclusive jurisdiction in the District Court. C.A. App. 970. Only the concluding briefs are in the record, and they contain no objection whatsoever to the arbitrator's jurisdiction. C.A. App. 1007-61, 1118-35.

3. Exclusive Federal Jurisdiction To Interpret a Class Action Settlement Does Not Extend to Disputes Between Class Members and Third Parties Who Raise a Defense of Double Recovery.

Respondents' argument as to the third question presented in the petition, which involves the reach of exclusive federal jurisdiction to interpret a class action settlement, primarily relies upon dicta in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994). Br. Opp. 17. When the dicta are read in context, it is apparent that they do not support respondents' position.

In *Kokkonen*, this Court held that, where a civil action in federal court is dismissed following a settlement agreement, without a reservation of jurisdiction to enforce the settlement agreement, the court lacks ancillary jurisdiction over a subsequent motion by one of the parties to enforce the agreement. *See* 511 U.S. at 379-80. The Court noted that it had previously asserted ancillary jurisdiction to permit disposition by a single court of factually interdependent claims, and to enable a court to manage its proceedings, vindicate its authority, and effectuate its decrees. *Id.* at 380. On neither basis, the Court concluded, could the district court exercise jurisdiction over the motion to enforce the agreement. *Id.* The Court added that "if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal," then "a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Id.* at 381.

Respondents characterize the foregoing comment as an "express statement approving jurisdiction" in cases like the present one. Br. Opp. 13; *see also id.* 17. It is nothing of the kind.

First, *Kokkonen* does not say one word about *exclusive* federal jurisdiction. The Court discussed only whether federal jurisdiction existed *at all*. Yet the Fourth Circuit's decision in this case depends upon the notion that the arbitrator, in awarding damages on a state-law malpractice claim arising from legal services provided in state court, somehow usurped the District Court's exclusive jurisdiction. A. 35a.

Second, because *Kokkonen* involved a dispute between the original parties to an action in federal court, the Court's dicta clearly referred to a hypothetical dispute also involving *the original parties*, but where the parties' duty to comply with the settlement agreement had been made part of the order of dismissal. In contrast, here the Fourth Circuit asserted exclusive federal jurisdiction over a dispute between class members and *third parties*. Respondents were not parties to the class action settlement. Nor were they among the parties released in the settlement. *Kokkonen* simply does not speak to ancillary jurisdiction over disputes between parties to a federal settlement and third parties, let alone to the assertion of exclusive jurisdiction over such disputes.

Respondents also maintain that, after a nationwide federal class action settlement, federal court "control" over disputes between class members and third parties is necessary to avoid the "utter chaos" of resolving such disputes where class members reside. Br. Opp. 17. But respondents offer nothing to suggest that state courts and state arbitrators are incapable of deciding these disputes, or that "chaos" would result if the disputes were not swept into federal court. In general, the state court judges and arbitrators of a given state are more knowledgeable about the law of that state than a federal judge sitting in another state. *See Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974) ("When federal judges in New York attempt to predict uncertain Florida law, they act . . . as 'outsiders' lacking the common exposure which comes from sitting in

the jurisdiction." (quoting *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941))). It makes much more sense for a legal malpractice claim under California law, brought by California clients against a California attorney and law firm, over the conduct of litigation in a California state court, to be decided by a California court or arbitrator, than for the claim to be decided by a federal court three thousand miles away. The concept of ancillary jurisdiction should not be stretched to confer on the already-overburdened federal courts jurisdiction—much less exclusive jurisdiction—over state-law controversies between class members and nondiverse third parties.

4. This Case Is Not Similar to *Thomas v. Powell.*

Respondents maintain that there is no conflict in the circuits because *Thomas v. Powell*, 247 F.3d 260 (D.C. Cir.), *cert. denied*, 534 U.S. 951 (2001), is the "only . . . relevant case, and it reached the same result as the Fourth Circuit did here." Br. Opp. 20. But *Thomas* is not at all similar to this case, and the Fourth Circuit's decision is indeed in conflict with decisions in several circuits barring collateral attacks on arbitration awards. *See* Pet. Cert. 11-13.

Thomas involved a federal class action settlement and a later claim of legal malpractice, but that claim was brought *against class counsel* and attacked their handling of the settlement *before the federal court*. In contrast, petitioners' malpractice claim did not arise from anything class counsel had done—or indeed anything done by any attorney in the federal class action or the other MDL proceedings. "The Millers' claims in arbitration involved the completely distinct legal issue of whether, under California law, Silver committed malpractice in a prior state court action that was never before the district court." A. 46a (Traxler, J., dissenting); *see also* A. 45a (Traxler, J., dissenting) ("Silver did not participate in the MDL proceedings as either a litigant or as counsel for the Millers").

Respondents are wrong to characterize the difference between this case and *Thomas* as simply that here "the attorneys were individually retained rather than class counsel." Br. Opp. 23. Respondents did not represent petitioners in the MDL proceedings at all, and the malpractice claim challenged neither the class action settlement nor the conduct of class counsel—or anyone else—in negotiating the settlement. Respondents represented petitioners only in California state court. The malpractice claim concerned solely the representation respondents provided in state court.

In *Thomas*, unlike this case, each of the claims also required relitigating matters decided in the class action. For example, the plaintiffs "allege[d] that the class action attorneys 'sold out' their clients, that they engaged in collusive secret negotiations to the detriment of their clients," but the district court had "squarely decided otherwise" before it approved the class action settlement. *Thomas*, 247 F.3d at 264. Here, petitioners' malpractice claim did not require relitigating any matter decided in the class action. The class action had a bearing on petitioners' malpractice claim only because of the damages formula established by California law governing recovery for legal malpractice: "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission." *Norton v. Superior Court*, 30 Cal. Rptr. 2d 217, 221 (Ct. App. 1994). As required by California law, the arbitrator simply took account of "what was recovered" by petitioners in the class action. In doing so, the arbitrator did not do anything that could possibly be deemed a usurpation of the District Court's jurisdiction.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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